No. 108, Original

IN THE

**Supreme Court of the United States**
OCTOBER TERM 1986

STATE OF NEBRASKA,

*Plaintiff*

v.

STATE OF WYOMING,

*Defendant.*

**UPON EXCEPTIONS TO THE FIRST AND SECOND INTERIM REPORTS OF THE SPECIAL MASTER**

# REPLY BRIEF OF NATIONAL AUDUBON SOCIETY AND PLATTE RIVER WHOOPING CRANE CRITICAL HABITAT MAINTENANCE TRUST

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August 17, 1992

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National Audubon Society ("Audubon") and Platte River Whooping Crane Critical Habitat Maintenance Trust (the "Trust") respectfully submit

this reply brief in response to the Exceptions filed by the States of Wyoming and Colorado to the First and Second Interim Reports filed by Special Master Owen Olpin in this case. This reply brief focuses on the Special Master's recommendations to deny the motions of the upstream States relating to the downstream of Tri-State dam issues.

## INTRODUCTION AND SUMMARY

Audubon and the Trust have participated in this case as amici curiae to represent wildlife interests that will be affected by the outcome of this case. The Platte River in central Nebraska is one of the nation's most important migratory bird staging areas and provides habitat for half a dozen threatened and endangered species. In this case Nebraska is challenging the proposed construction in Wyoming of two projects, the Deer Creek and Corn Creek projects, that, among other things, threaten the downstream bird habitat. More generally, the resolution of this dispute over the interstate allocation of the North Platte River is of interest to Audubon and the Trust because it may affect the total quantity of water available in Nebraska for irrigation, wildlife, and other purposes.



The States of Wyoming and Colorado contend that the Special Master erred in refusing at this stage of the case to bar the State of Nebraska from introducing evidence relating to water uses in Nebraska downstream from Tri-State dam in support of her claims. In fact, the Special Master correctly concluded that the downstream from Tri-State dam issue cannot be resolved in favor of the upstream States as a matter of law, given the present posture of the case and the substantial arguments advanced by Nebraska that she has protected rights in below Tri-State flows under the 1945 decree.

While both the Special Master and the parties address the downstream of Tri-State issues and the issues relating to the proposed Corn Creek and Deer Creek projects separately, in fact these issues are closely intertwined. A primary thrust of the upstream States' effort to bar evidence of below Tri-State uses is to limit the scope of Nebraska's claims respecting these two projects. For the reasons explained below, resolution of Nebraska's claims respecting Corn Creek and Deer Creek call upon the Court to consider the need for further relief pursuant to its reservation of jurisdiction in Paragraph XIII of the decree. Accordingly, these claims, including the relevance of evidence of injury to Nebraska interests below Tri-State that would result from the construction of these

projects, cannot be resolved as a matter of law based solely on the language of the existing decree.

Finally, Audubon and the Trust strongly object to the proposal by the upstream States that the limited role of Audubon, the Trust, and other amici in these proceedings be further circumscribed.

## ARGUMENT

### I. THE SPECIAL MASTER PROPERLY RECOMMENDED DENIAL OF THE UPSTREAM STATES' MOTIONS FOR SUMMARY JUDGMENT ON THE DOWNSTREAM OF TRI-STATE ISSUES.

Wyoming and Colorado contend that the Special Master erred in not recommending that Nebraska be barred from introducing evidence concerning water uses below Tri-State in support of her claims. Contrary to the arguments of the upstream States, the Special Master properly recommended denial of their motions for summary judgment on this issue.

Wyoming has filed a counterclaim on the downstream of Tri-State issue alleging that Nebraska is violating the decree. But Wyoming has not moved for summary judgment on that claim.



Instead, Wyoming (and Colorado) have selected the convoluted course of filing motions requesting that the Court bar Nebraska from introducing evidence concerning downstream of Tri-State uses in support of her claims. The Special Master understandably and correctly concludes that the upstream States' arguments on the below Tri-State issue, so presented, have not "crystallized the issues such that they are presently postured -- i.e. ripe -- for resolution." Second Interim Report at 92.

The Special Master's recommendation on the Tri-State issue also is supported by the "important point" that return flows serving uses below Tri-State undeniably formed a "predicate" of the Court's 1945 decree. Second Interim Report at 94. While the Court in 1945 did not make a specific apportionment to Nebraska below Tri-State dam, the Court's decision not to do so was expressly based on the premise that Nebraska canals below Tri-State "are adequately supplied from return flows and other local sources." Nebraska v. Wyoming, 325 U.S. 589, 655 (1945). Especially in view of the Court's broad reserved authority to adopt appropriate supplemental relief in this case, see Section II infra, it is appropriate to assess carefully exactly what below Tri-State uses were considered at the time of the original decree and to what extent the premise of that decision is valid.

There is ample reason for the Special Master's decision to "proceed cautiously" on this issue.

Finally, there is no basis for the upstream States' argument that the extent of Nebraska's rights under the decree is defined by limitations on allowable diversions into specific canals above and below the Tri-State dam. The Court apportioned the flows in the Whelan to Tri-State section of the river during the irrigation season 25% to Wyoming and 75% to Nebraska. Special Master Dougherty calculated the flows in certain canals serving Nebraska that were senior to upstream reservoirs in Wyoming, and these calculations are reflected in Paragraph V of the decree. However, as the Special Master explains in his Second Interim Report (at 97), referring to the Court's original opinion, see 325 U.S. at 625, the Court accepted the determination of the relative seniority of these canals only for a "limited purpose" -- as an aid in fixing the proper percentage allocation of river flow as between the States of Nebraska and Wyoming. Neither Special Master Dougherty nor the Court intended for flows into these specific canals to define the measure of Nebraska's rights and thereby dictate the intrastate administration of each State's apportionment.



## II. THE UPSTREAM STATES' MOTIONS FOR SUMMARY JUDGMENT ON BELOW TRI-STATE ISSUES ALSO SHOULD BE REJECTED BECAUSE RESOLUTION OF THE DEER CREEK AND CORN CREEK ISSUES MAY REQUIRE NEW INJUNCTIVE RELIEF, INCLUDING PROTECTION OF NEBRASKA EQUITIES BELOW TRI-STATE.

The Special Master's recommendation to deny the upstream States' motions for summary judgment on the below Tri-State issues also should be accepted because any future proceedings on the merits of the Deer Creek and Corn Creek issues will entail consideration of the effects of these projects on Nebraska interests below Tri-State. The upstream States assume that the Court in this case may not consider evidence concerning the below Tri-State effects of these two projects, ostensibly because the 1945 decree granted Nebraska no rights below Tri-State. For the reasons discussed in Section I, we believe the upstream States are mistaken on this point, and at a minimum it would be premature to rule in their favor on this issue at this time. But even if they were correct that the present decree provides Nebraska no rights in

water downstream from Tri-State, the effect of Corn Creek and/or Deer Creek on flows below Tri-State would still be relevant to the Court's determination under Paragraph XIII of the decree whether and how to fashion new relief with respect to these projects.

**Deer Creek.**

Wyoming requests that the Court dismiss as a matter of law Nebraska's request for an injunction against the construction of the Deer Creek project. In support of her request, Wyoming contends that the resolution of Nebraska's Deer Creek claim should turn on whether Nebraska can show that operation of this project would violate Nebraska's apportionment for uses diverting at or above Tri-State. Wyoming Exceptions at 40. This contention ignores the language of the 1945 decree and the specific nature of the Deer Creek claim.

From the time Nebraska filed its proposed petition with the Court on October 6, 1986, it has been apparent that Nebraska could not possibly obtain the relief she seeks with respect to the Deer Creek project based on the apportionment and injunctions in the existing decree. This is so for the simple reason that the 1945 decree does not specifically restrict development on Deer Creek and other tributaries between Pathfinder Reservoir and Guernsey Reservoir. In invoking the Court's jurisdiction on the Deer Creek issue, Nebraska



expressly invoked Section XIII of the decree in which the Court "[r]etained jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter of the controversy," including "(c) [t]he question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir." By allowing Nebraska to file its petition, the Court authorized the Special Master not merely to enforce the decree but also to fashion appropriate new relief to address the Deer Creek project.

While Wyoming has now apparently abandoned the argument, at the outset of the case she repeatedly sought dismissal of the Deer Creek claim on the theory that this claim was outside the scope of this "enforcement" action. See Wyoming Brief in Opposition to Motion for Leave to File Petition (December 16, 1986), at 19-21; Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion (Sept. 11, 1987), at 93; see also First Interim Report, at 29-30. Wyoming contended, both before the Court and the Special Master, that Nebraska should not be permitted to go forward on the Deer Creek issue because development on Deer Creek is not restricted under

the present decree. As Wyoming now acknowledges, this argument was rejected, precisely because Paragraph XIII(c) of the Decree, which Nebraska invoked at the outset of the case, authorizes the Court (and in turn the Special Master) to fashion new relief beyond the scope of the existing decree. Wyoming Exceptions at 38. While Wyoming now characterizes this conclusion as "incorrect" (Wyoming Exceptions at 39), neither she nor Colorado specifically except to the Special Master's determination that, under the language of the decree, Nebraska's Deer Creek claim is entitled to due consideration. Under Paragraph XIII(c) of the decree, the Deer Creek claim can only be resolved through a factual evaluation of the need for a supplementary or other appropriate order.

The specific injunctions and other language in the present decree do not limit the Court's or the Special Master's ability in this case to fashion appropriate relief to address Deer Creek based on the circumstances as they now exist. The Court retained jurisdiction for the purpose of entering "any supplementary decree." The Court is not limited simply to enforcing the injunctions already in the decree, as the upstream States suggest, or required only to consider the equities as presented and understood fifty years ago. To the contrary, the Court in Paragraph XIII retained jurisdiction to grant such relief "that may at any time be deemed



proper in relation to the subject matter in controversy." This comfortably would include any appropriate injunctive relief with respect to the Deer Creek project to prevent injury to established uses and equities below Tri-State, whether or not those uses are specifically protected by the existing apportionment and injunctions in the 1945 decree.[1]

In sum, by allowing Nebraska to include the Deer Creek issue in its petition, recognizing that resolution of this claim in Nebraska's favor would necessarily involve fashioning new relief under Paragraph XIII(c), the Court authorized the Special Master to consider all relevant equitable factors bearing on the need for an injunction against the Deer Creek project, including injury to uses in Nebraska below the Tri-State dam.

**Corn Creek**

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1 In seeking to cut off further proceedings relating to the downstream of Tri-State dam issues, the upstream States make much of the fact that the Court denied, without explanation, Nebraska's previous motion to the Court to amend her petition for an apportionment of the North Platte below Tri-State. See Nebraska v. Wyoming, 485 U.S. 931 (1988). The Special Master has interpreted this decision to mean that he is barred from considering the need for a new apportionment below Tri-State, but that he is entitled to consider uses and equities below Tri-State in considering the need for new equitable relief to supplement the 1945 decree. First Interim Report at 36-37. That interpretation of the scope of the Special Master's charge properly reconciles the Court's decision to allow Nebraska to invoke Paragraph XIII of the existing decree when she filed her petition, with the Court's 1988 decision denying Nebraska's motion to amend her petition.

Like the Deer Creek issue, the Corn Creek issue cannot be resolved as a matter of law in Wyoming's favor at this stage of the proceedings. Nebraska is entitled to present her full case demonstrating that the project will disturb the "delicate balance" of the river, 325 U.S. at 625, and cause injury to Nebraska interests below Tri-State dam.

The Special Master concluded, based on an exhaustive analysis of the earlier decrees and the parties' subsequent course of conduct, that the flows of the Laramie river were not fully apportioned to Colorado and Wyoming. Second Interim Report at 59. On the other hand, he concluded that the 1945 decree made no specific apportionment to Nebraska. Instead, he concluded that Laramie waters are part of the water supply to the North Platte and that Nebraska "has equities to be considered respecting the Laramie's contribution to the mainstem." Second Interim Report at 64. Audubon and the Trust do not now dispute this conclusion.

Given the conclusion that the waters of the Laramie have not been fully apportioned, the Special Master has no option in resolving the Corn Creek issue other than to consider the need for appropriate supplemental relief under Paragraph XIII of the decree. Wyoming objects that this means that a trial may in effect be required for "an



apportionment" of the Laramie River. Wyoming Exceptions at 73. Whether or not a recommendation for a new apportionment would actually be required, the need to fashion new relief that supplements the 1945 decree is merely the unsurprising and natural result of the Special Master's rejection of the competing claims of Nebraska and Wyoming that the waters of the Laramie had already been fully apportioned. How the unapportioned waters of the Laramie should now be apportioned, and how Wyoming's potential uses of these waters might affect Nebraska's interests, including uses and equities below Tri-State, are squarely part of this case as pleaded by Nebraska and as it has evolved based on the Special Master's resolution of the parties conflicting claims to Laramie waters.

Contrary to the position of the upstream States, the prior apportionment of the Whelan to Tri-State section under the 1945 decree does not limit or affect the Court's ability to fix an apportionment for the Laramie and fashion appropriate equitable relief to protect the equities in each State as they currently exist. In fashioning appropriate relief to address the Corn Creek project under Paragraph XIII, the Court is not limited either by the geographic scope of the original 1945 decree or by the specific uses and equities as they existed or were understood at the time.

## III. THERE IS NO BASIS FOR FURTHER LIMITING AMICI'S FUTURE PARTICIPATION IN THIS CASE.

Wyoming and Colorado urge the Court to insert itself into the details of the trial procedure before the Special Master by limiting the role of amici, including Audubon and the Trust in this case.[2] Wyoming Exceptions at 10 n. 7; Colorado Exceptions at 5 n. 6. This request is unwarranted and the Court should reject it.

First, further restrictions on the amici's opportunities to participate in this case are unnecessary. The Special Master has recommended in his Second Interim Report that amici's motions to intervene be denied. Neither Audubon nor the Trust has filed exceptions to that recommendation. As described in the Special Master's Second Interim Report (at 104), he has "granted all amici the privilege to present affidavits, file briefs, and, 'upon a showing of good cause,' participate more fully respecting key matters in the proceedings." (Emphasis added) Thus, the Special Master has assigned a limited role to amici and granted them no responsibility for shaping the future scope or

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2 The other active amici in this case are Basin Electric Power Cooperative and Central Nebraska Public Power and Irrigation District.



direction of these proceedings. Furthermore, Audubon and the Trust have carefully confined their participation in this case to the below Tri-State issues. Given the present limited role of the amici, there is no justification for asking that their role be even further circumscribed.

Second, the proposal to require the Special Master to limit future participation by amici would interfere with the exercise of his responsibilities to the Court. As the Special Master states in his Second Interim Report (at 104), "I have always seen the amici as potential sources of expertise and will continue to do so." While the Special Master states that he intends to rely principally on the United States, a party to this case, to represent environmental and wildlife interests, the United States represents a wide variety of sometimes divergent agency interests in these proceedings. To limit the Special Master's ability to invite Audubon or the Trust, for example, to present evidence on environmental and wildlife issues might well prejudice the Special Master's ability to compile as complete and as accurate a record as he deems appropriate. There is simply no reason for limiting the Special Master's discretion to gather relevant evidence that he needs to discharge his duty to the Court.

## CONCLUSION

For the foregoing reasons, Audubon and the Trust request that the Court reject the Exceptions filed by the States of Wyoming and Colorado respecting the downstream of Tri-State issues.

Respectfully submitted,

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August 17, 1992.